Md Amin bin Md Yusof & Anor v Cityvilla Sdn Bhd

COURT OF APPEAL (PUTRAJA YA) — CIVIL APPEAL NO 02–9 OF 2002
MOHD GHAZALI, NIK HASHIM JJCA AND LOW HOP BING J
27 MAY 2004

Civil Procedure — Case management — Directions made by trial judge during pre-trial case management — Non-compliance by appellants — Court struck out appellants' counterclaim — Whether appellants' failure to comply intentional and contumelious — Whether striking out decision resulted in injustice to appellants — Rules of the High Court 1980 O 34

The learned High Court judge, in the course of his pre-trial case management conference with solicitors for the parties pursuant to O 34 of the Rules of the High Court 1980 ('the RHC'), directed the parties to file certain documents by a particular date. The High Court judge also made a peremptory or an unless order which read 'if any party defaults in complying with the above directions, it/he will be precluded from prosecuting/defending its/his case and judgment will be given in favour of the party complying with the above directions'. The learned judge then fixed a date for the court to ascertain compliance with its directions. On that date, upon finding that the appellants had failed to comply with the directions, the learned High Court judge struck out with costs the appellants' counterclaim and forbade them from filing any document in support of their statement of defence without the leave of the court and or consent of the respondent.

This was the appellants' appeal against the decision of the High Court judge.

Held, allowing the appeal:

(1) Order 34 r 7 of the RHC provided for the discretionary power of the judge to make such order against the defaulting party 'as meets the ends of justice' should any party fail to comply with any direction given by the judge at any pre-trial case management conference. Whilst it was true that a party's action or counterclaim could be struck out for non-compliance with a peremptory or an unless order of the court, the order should not be made unless there was a history of failure to comply with other orders. Therefore, all the circumstances of the case, inclusive of whether the failure to comply with the peremptory or unless order was indeed intentional and contumelious, should be looked at by the judge before penalizing the defaulting party (see paras 12–13).

(2) In the instant case, the learned High Court judge had overlooked the fact that the respondent too was not free from fault in that it also failed to comply with one of the learned judge's directions. This failure was certainly a factor which must be taken into account in considering whether the striking out order was an appropriate one under O 34 r 7 of the RHC (see para 14).

(3) Such an oversight on the part of the learned High Court judge had adversely affected his decision in entertaining the respondent's application to strike out the appellants' counterclaim. Since the respondent and the appellants were equally at fault, there were no good reasons why the court should be harsher towards the appellants than the respondent. The court should not favour any one party. Justice demanded that the case be allowed to proceed (see para 16).

(4) In any case, there was no wholesale disregard of the rules of the court by the appellants. Based on the records and the explanations given by the appellants, their failure to comply with the directions was not intentional or contumelious so as to justify the drastic action taken by the learned judge. Moreover, there was no record to show that learned counsel for the appellants was ever afforded an opportunity to reply to the respondent's application for the striking out of the appellants' counterclaim. The learned judge had proceeded to strike out the appellants' counterclaim soon after hearing the submission of the respondent's counsel. His decision was thus fatally flawed and wrong in principle, which had resulted in an injustice to the appellants who have been deprived of their right to have their counterclaim heard on its merit (see para 17).

[**Bahasa Malaysia summary**

Hakim Mahkamah Tinggi yang bijaksana, semasa mesyuarat pengurusan kes pra perbicaraan beliau dengan peguam cara untuk pihak-pihak tersebut menurut A 34 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT'), mengerahkan pihak-pihak memfailkan dokumen tertentu pada satu tarikh yang ditetapkan. Hakim Mahkamah Tinggi juga telah membuat satu perintah yang mesti dipatuhi atau 'unless order' yang menyatakan 'if any party defaults in complying with the above directions, it/he will be precluded from prosecuting/defending its/his case and judgment will be given in favour of the party complying with the above directions'. Hakim yang bijaksana kemudian telah menetapkan satu tarikh untuk mahkamah menentukan pematuhan arahan-arahannya. Pada tarikh tersebut, setelah mendpati bahawa perayu-perayu telah gagal untuk mematuhi arahan-arahan tersebut, hakim Mahkamah Tinggi yang bijaksana telah membatalkan tuntutan balas perayu-perayu dengan kos dan menghalang mereka daripada memfailkan apa-apa dokumen bagi menyokong pernyataan pembelaan mereka tanpa kebenaran mahkamah dan atau persetujuan responden.

Ini adalah rayuan perayu-perayu terhadap keputusan hakim Mahkamah Tinggi.

Diputuskan, membenarkan rayuan tersebut:

(1) Aturan 34 k 7 KMT memperuntukkan kuasa budi bicara hakim untuk membuat perintah sedemikian terhadap pihak yang gagal 'as meets the ends of justice' sekiranya mana-mana pihak gagal untuk mematuhi

apa-apa arahan yang diberikan oleh hakim dalam mana-mana mesyuarat pengurusan kes pra perbicaraan. Sekiranya ia benar bahawa tindakan atau tuntutan balas satu pihak boleh dibatalkan kerana ketidakpatuhan dengan satu perintah yang mesti dipatuhi atau satu 'unless order' mahkamah, perintah tersebut tidak sepatutnya dibuat kecuali jika terdapat sejarah kegagalan mematuhi perintah-perintah lain. Oleh itu, kesemua keadaan kes, termasuklah sama ada kegagalan untuk mematuhi perintah yang mesti dipatuhi atau 'unless order' tersebut sememangnya disengajakan dan menghina mahkamah, perlu diteliti oleh hakim sebelum menghukum pihak yang gagal itu (lihat perenggan 12–13).

(2) Dalam kes semasa, hakim Mahkamah Tinggi terlepas perhatian tentang fakta bahawa responden juga tidak terlepas dari kesalahan yang mana ia juga gagal untuk mematuhi satu daripada arahan hakim tersebut. Kegagalan ini sememangnya satu faktor yang perlu diambil kira dalam mempertimbangkan sama ada perintah pembatalan tersebut adalah sesuai di bawah A 34 k 7 KMT (lihat perenggan 14).

(3) Kesilapan di pihak hakim Mahkamah Tinggi yang bijaksana telah menjejaskan keputusan beliau dalam mengendalikan permohonan responden untuk membatalkan tuntutan balas perayu-perayu. Memandangkan responden dan perayu-perayu sama-sama bersalah, tiada alasan baik untuk mahkamah lebih bertindak keras terhadap perayu-perayu daripada responden. Mahkamah tidak sepatutnya menyebelahi mana-mana pihak. Keadilan menuntut agar kes ini dibenarkan (lihat perenggan 16).

(4) Dalam apa keadaan, kaedah-kaedah mahkamah tidak diketepikan langsung oleh perayu-perayu. Berdasarkan rekod dan penjelasan yang diberikan oleh perayu-perayu, kegagalan mereka untuk mematuhi arahan-arahan tersebut bukan disengajakan atau menghina mahkamah untuk menjustifikasikan tindakan drastik yang diambil oleh hakim yang bijaksana. Tambahan pula, tiada rekod untuk menunjukkan bahawa peguam bijaksana bagi pihak perayu-perayu telah diberi peluang untuk menjawab kepada permohonan responden untuk membatalkan tuntutan balas perayu-perayu. Hakim yang bijaksana seterusnya telah membatalkan tuntutan balas perayu-perayu sejurus selepas mendengar hujah peguam responden. Keputusan beliau oleh itu adalah cacat dan salah secara prinsipnya, yang menyebabkan ketidakadilan kepada perayu-perayu yang terkilan akan hak mereka untuk mendapatkan tuntutan balas mereka didengar atas merit (lihat perenggan 17).]

Notes

For cases on directions made by trial judge during pre-trial case management, see 2(3) *Mallal's Digest* (4th Ed, 2001 Reissue) para 1364.

Cases referred to

Hytec Information Systems Ltd v Coventry City Council [1997] 1 WLR 1666 (refd)
Jokai Tea Holdings Ltd, In re [1992] 1 WLR 1196 (refd)
Lee Mun Tuck v Tan Chin Kah & Anor [1991] 2 MLJ 324 (refd)
Tan Geok Lan v La Kuan @ Lian Kuan [2004] 3 MLJ465 (refd)
Transcom Rand (M) Sdn Bhd v MARA Holdings Sdn Bhd [2002] 3 MLJ 31 (refd)
United Malayan Banking Corp Bhd v Palm and Vegetable Oils (M) Sdn Bhd & Ors [1994] 3 MLJ 73 (refd)

Legislation referred to

Rules of the High Court 1980 O 34 r 7

Joginder Singh, Shahareen Begum (Imran, Shahareen & Co) for the appellants.
Tee Geok Hock, N Rajentharan (GH Tee&Co) for the respondent.

Nik Hashim JCA (delivering judgment of the court):

Background

[1] On 24 September 2001, the learned judge, in the course of his pre-trial case management conference with solicitors for the parties pursuant to O 34 of the Rules of the High Court 1980 ('the RHC'), directed the parties to file the following by 24 November 2001:

(a) bundle of pleadings;

(b) common bundle(s) of documents divided into parts;

(c) statement of agreed facts;

(d) issues;

(e) statement of each party's case and facts to be proved in relation to issues.

[2] And also made a peremptory or an unless order which reads:

> if any party defaults in complying with the above directions, it/he will be precluded from prosecuting/defending its/his case and judgment will be given in favour of the party complying with the above directions.

[3] The learned judge then fixed 7 December 2001 for the court to ascertain compliance with its directions and for further directions.

[4] On 7 December 2001, upon finding that the appellants (the defendants in the court below) have failed to comply with the directions, the learned judge struck out with costs the appellants' counterclaim and forbade them from filing any document in support of their statement of defence without the leave of the court and or consent of the respondent (the plaintiff in the court below).

[5] In making the orders, the learned judge said this:

> The provisions of Order 34 of the Rules of the High Court 1980 are not intended to be a dead letter to merely embellish the Rules without any teeth. It is clear that the defendants have been tardy in compliance with the court's directions on 24 September 2001, despite having been put on notice of the penalty that will follow for non-compliance. No attempt was made by the defendants to ask for the plaintiff s bundles although Encik Pari has said the defendants wanted to look at the plaintiff s bundle first.
>
> In these circumstances, I am of the view that this is a proper case where the court would be properly exercising its powers to invoke Order 34 rule 7 of the Rules of the High Court 1980 to enter judgment for the plaintiff on its claim and strike out the defence and the counterclaim. However, since counsel for the plaintiff is only seeking to bar the defendants from pursuing their counterclaim, I hereby order that the counterclaim be struck off with costs and that the defendants pay the costs of today's proceedings to the plaintiff. The defendants are also precluded from filing any documents in support of the defences from here on without the consent of the plaintiff or the approval of the court.

[6] It is pertinent to note that on 7 December 2001 both parties failed to file their respective statements of case as required under para (e) of the directions.

[7] The records showed that the respondent's claim and the appellants' counterclaim arose from the sale of the appellants' shares in a company known as Alfa Lagenda Sdn Bhd to the respondent pursuant to an agreement dated 20 September 1994.

[8] According to the agreement the purchase price of RM13,000,000 was agreed to be paid by the respondent to the appellants in the following manner:

(i) RM3,000,000 upon execution of the agreement;

(ii) RM3,700,000 upon execution of a privatization agreement between Alfa Lagenda and State Government of Johor; and

(iii) RM9,000,000 within three years of execution of the privatization agreement.

[9] The privatization agreement was executed on 28 March 1995 but the balance purchase price of RM9,000,000 was not paid. The respondent's claim is based on the alleged breaches and or frustration of the agreement by the appellants and as a result the respondent claimed that it had suffered loss and damage.

Appeal

[10] It is the submission of learned counsel for the appellants that the learned judge had exercised his discretion on wrong principles and caused a miscarriage of justice. Learned counsel for the respondent however, maintained that failure to comply with peremptory order is serious and submitted that the learned judge was right in his decision.

Decision

[11] The procedures and powers of the High Court in pre-trial case management are provided under O 34 of the RHC which came into force on 22 September 2000 vide PU (A) 342/2000, and they are so provided so that the action could be brought to trial within time. The significance of case management procedure needs no emphasis. If emphasis is still needed then reference may be made to the recent Federal Court case of *Tan Geok Lan v La Kuan @ Lian Kuan* [2004] 3 MLJ 465 where Mohd Noor Ahmad FCJ at p 473 said:

> The significance of this procedure is that it marks a change from the traditional position under which the progress of cases was left largely in the hands of the parties. Now, under the procedure the court controls the progress of cases by the exercise of its powers given to it to enable it, and not the parties, to dictate the progress of cases at the pre-trial stage, ensuring that the practices and procedures applicable during that stage are complied with promptly and not abused.

[12] Whereas r 7 of this order states:

> If any party to an action fails to comply with any direction given by the Judge at any pre-trial conference, such order may be made against the defaulting party by the judge as meets the ends of justice.

[13] Order 34 r 7 provides for the discretionary power of the judge to make such order against the defaulting party 'as meets the ends of justice' should any party fail to comply with any direction given by the judge at any pre-trial case management conference.

[14] Whilst it is true that a party's action or counterclaim could be struck out for non-compliance with a peremptory or an unless order of the court, the order would not be made unless there is a history of failure to comply with other orders. A peremptory or an unless order is an order of last resort (see *Hytec Information Systems Ltd v Coventry City Council* [1997] 1 WLR 1666 at p 1674H). Surely, it would not meet the ends of justice if the order made results in a miscarriage of justice. Therefore, all the circumstances of the case, inclusive of whether the failure to comply with the peremptory or unless order was indeed intentional and contumelious, should be looked at by the judge before penalizing the defaulting party (see *In re Jokai Tea Holdings Ltd* [1992] 1 WLR 1196 (CA)).

[15] In the instant case, the learned judge overlooked the fact that the respondent too was not free from fault in that it also failed to comply with para (e) of the learned judge's directions. This failure is certainly a factor which must be taken into account in considering whether the striking out order is an appropriate one under O 34 r 7 of the RHC.

[16] In *United Malayan Banking Corp Bhd v Palm and Vegetable Oils (M) Sdn Bhd & Ors* [1994] 3 MLJ 73, Mohamed Dzaiddin SCJ (as he then was) at p 81 had occasion to observe:

> ..., the learned judge overlooked the fact that the respondent themselves have yet to file their list of documents within the stipulated period under the order of the senior assistant registrar in the summons for directions. This is certainly a factor to be taken into account as to whether the respondents have contributed to the delay.

[17] Such an oversight on the part of the learned judge, to our mind, had adversely affected his decision in entertaining the respondent's application to strike out the appellants' counterclaim. Since the respondent and the appellants are equally at fault, we see no good reasons why the court should be more harsh towards the appellants than the respondent. The court should not favour any one party and justice would demand that the case be allowed to proceed (see *Lee Mun Tuck v Tan Chin Kah & Anor* [1991] 2 MLJ 324 at pp 325–326; *Transcom Rand (M) Sdn Bhd v MARA Holdings Sdn Bhd* [2002] 3 MLJ 31).

[18] Besides, there was no wholesale disregard of the rules of the court by the appellants. The appellants were still in the process of trying to reach an agreement with the respondent over the documents to be filed. From the records and the explanations given by the appellants, we found that the appellants' failure to comply with the directions was not intentional or contumelious justifying the drastic action taken by the learned judge. Moreover, there was no record to show that learned counsel for the appellants was ever afforded an opportunity to reply to the respondent's application for the striking out of the appellants' counterclaim. In this case, the learned judge proceeded straight to strike out the appellants' counterclaim soon after hearing the submission of learned counsel for the respondent. In our judgment, his decision was thus fatally flawed and wrong in principle which had resulted in an injustice to the appellants who have been deprived of their right to have their counterclaim heard on its merit. The learned judge's decision does not meet the ends of justice.

[19] We are of the view that under the circumstances, this was a fit and proper case for interference by this court. Accordingly, we allowed the appeal with costs in the cause and set aside the order of the learned judge and remitted the case to the High Court for further case management. The deposit paid into court shall be refunded to the appellants.

Appeal allowed.

Reported by Lim Lee Na